SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

09/26/2002

CLERK OF THE COURT
FORM L000

HONORABLE MICHAEL D. JONES

P. M. Espinoza
Deputy

LC 2002-000139
LC 2002-000108

FILED: _____

STATE OF ARIZONA

BIANCA E BENTZIN

v.

DIANE G JOHNSON

DIANE G JOHNSON
1013 W MADISON ST
PHOENIX AZ 85007-0000

FINANCIAL SERVICES-CCC
PHX CITY MUNICIPAL COURT
REMAND DESK CR-CCC

MINUTE ENTRY

PHOENIX CITY COURT

Cit. No. SEE FILE

Charge: See File

DOB: 06/26/45

DOC: 01/09/02

This Court has jurisdiction of this appeal pursuant to the Arizona Constitution Article VI, Section 16, and A.R.S. Section (A).

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HONORABLE MICHAEL D. JONES P. M. Espinoza
Deputy

LC 2002-000139
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This matter has been under advisement since the time of oral argument on August 25, 2002, and the Court has considered and reviewed the record of the proceedings from the Phoenix Municipal Court and the memoranda submitted by the parties.

This decision is made within 30 days as required by Rule 9.8, Maricopa County Superior Court Local Rules of Practice. This Court has considered the record of the proceedings from the Phoenix City Court, the exhibits made of record, and the Memoranda submitted by the parties.

1. Factual and Legal Background

On May 12, 2001, the Appellant, Diane Johnson was issued seven civil citations for violating Phoenix City Code (P.C.C.) § 39-6B (maintaining an unsound fence), § P.C.C. § 39-6A (maintaining exterior surfaces in blighted or deteriorated condition), P.C.C. § 39-6C (rodent and insect infestation), P.C.C. § 39-7A (parking on a non-dust proof surface), P.C.C. § 39-7D (vegetation in condition), P.C.C. § 39-7A (maintaining an accumulation of trash and litter), and P.C.C. § 41-701A8 (occupying an RV not in an RV park) of the Neighborhood Preservation Ordinance of the City of Phoenix and the Phoenix Zoning Ordinance. Although the citations indicate May 12, 2001, as the date of the violation, the citations were amended prior to trial after no objection from Appellant.

On October 23, 2001, the court granted Appellee's motion to dismiss the charge of P.C.C. § 41-701A8, occupying a RV not in an RV park, without prejudice. A hearing was held before the Honorable Fidelis V. Garcia on the remaining six charges and the Appellant was found responsible for five of the six violations. The Appellant was found not responsible for P.C.C. § 39-6C (rodent and insect infestation). The sentencing hearing was held on December 17, 2001 and January 9, 2002, with the Appellant

sentenced on February 13, 2002, for the following fines: P.C.C. § 39-75 for $50.00, P.C.C. § 39-7A for $ 50.00, P.C.C. § 1500.00, P.C.C. § 39-6B for $1,000.00, and P.C.C. § 39-6C for $1,000.00 a grand total of $ 3,600.00. On February 19, 2002, Appellant filed her timely Notice of Appeal.

On January 9, 2002, Appellant Johnson was cited with another five civil charges (LC2002-000139) for violating P.C.C. § 39-6B (maintaining an unsound fence), P.C.C. § 39-6A (maintaining exterior surfaces in blighted or deteriorated condition), P.C.C. § 39-7G (parking on a non-dust proof surface), P.C.C. § 39-6E4 (maintaining a structurally unsound or blighting evaporative cooler), and P.C.C. § 41-608C8E1 (outside storage and landscaping materials visible beyond the property boundaries) of the Neighborhood Preservation Ordinance and the Phoenix Zoning Ordinance. On February 13, 2002, the charges were submitted for final determination to the court by way of stipulation of the facts. On February 28, 2002, the Honorable Fidelis V. Garcia found Appellant responsible on all five charges and fined Appellant $1,600.00, which were all suspended.

The Appellant raises five issues on appeal. First, the Appellant argues there was insufficient evidence to find her responsible of the charges. Second, Appellant argues that the Trial Court erred by not allowing her to argue applicable case law during the trial. Third, Appellant argues that the charging document was overly vague. Fourth, Appellant contends the photographs of her property admitted into evidence violate the Fourth Amendment. Fifth, the Appellant argues that the State violated Phoenix City Code Section 39-2.

2. Standard of Review

The standard of review of municipal ordinances is the same as that of statutes.[1] In matters of statutory interpretation, the standard of review is de novo.[2] However, the appellate court

[1] Abbott v. City of Tempe, 129 Ariz. 273, 275, 630 P.2d 569, 571 (App. 1981).

does not reweigh the evidence.[3] Instead, the evidence is reviewed in a light most favorable to affirming the lower court's ruling.[4]

On appeal, this court must look only at whether there was substantial evidence to support the trial court's decision.[5] Only if there were no probative facts to support the verdict can Appellant prove the evidence was insufficient for the ruling.[6]

3. Insufficient Evidence

Appellant argues that the evidence presented did not support a finding of responsible. In a civil case, the State need only establish that the Appellant was responsible by a preponderance of the evidence:

> The most acceptable meaning to be given to the expression, proof by a preponderance, seems to be proof which leads the [trier of fact] to find that the existence of the contested fact is more probable than its nonexistence.[7]

Indeed, the Supreme Court of Arizona has stated long ago that by a preponderance of the evidence "the ultimate test is, does the evidence convince the trier of fact that one theory of the case is more probable than the other."[8] When sufficiency of the evidence is questioned, an appellate court will not reweigh conflicting evidence but may only examine the record to determine whether there is substantial evidence to support the

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[2] In re Kyle M., 200 Ariz. 447, 448, 27 P.3d 804, 805 (Ariz. App. 2001); See also State v. Jensen, 193 Ariz. 105, 970 P.2d 937 (App. 1998).
[3] Id.
[4] In re Kyle M., 200 Ariz. at 448; State v. Fulminante, 193 Ariz. 485, 492-3, 975 P.2d 75, 82-83 (1999).
[5] State v. Pittman, 118 Ariz. 71, 574 P.2d 1290 (1978).
[6] State v. Carter, 118 Ariz. 562, 578 P.2d 991 (1978); State v. Barnett, 111 Ariz. 391, 531 P.2d 148 (1975).
[7] Callendar v. Transpacific Hotel Corporation, 179 Ariz. 557, 880 P.2d 1103 (App. 1993).
[8] In re Appeal in Maricopa County, 138 Ariz. 282 quoting Cole v. Town of Miami, 52 Ariz. 488, 497, 83 P.2d 997, 1001 (1938).

findings.[9] The main concern is whether the facts have been established which might reasonably support the trial court's judgment.[10] First, the Appellant stipulated that the photographs taken depicted her backyard. Second, the inspector testified that the photographs fairly and accurately depicted the scene at that time.[11] The testimony of the inspector and other witnesses and the photographs presented provided substantial evidence to support the hearing officer's conclusion that Appellant's property was in violation of the Neighborhood Preservation Ordinance. The trial judge is in the best position to evaluate the evidence and sufficient evidence was presented from which the trier of fact could find the Appellant responsible. Therefore, we reject the Appellant's contention that the verdict was contrary to the weight of the evidence. We find no error.

5. Admitted Evidence

Appellant contends that the lower court erred by not admitting into evidence certain photographs and documents that should have been admitted. In addition, she contends that the lower court erred by not allowing her to argue what she felt was applicable case law during the trial and that she could not object to evidence that was unknown to her prior to trial. First, regarding the non-admission of photographs and documents, the lower court refused to admit these items on the grounds of relevance.[12] The trial court has considerable discretion in determining relevancy and the admissibility of evidence.[13] Under the City of Phoenix local rules of evidence:

> The Arizona Rules of Evidence shall not apply in civil violation cases. Any

[9] Callendar v. Transpacific Hotel Corporation, 179 Ariz. 557, 880 P.2d 1103 (App. 1993).
[10] Callendar v. Transpacific Hotel Corporation, 179 Ariz. 557, 880 P.2d 1103 (App. 1993).
[11] Slow Development Cp. V. Coulter, 88 Ariz. 122, 129-30; See also Higgins v. Arizona Savings & Loan Ass'n, 90 Ariz. 55, 365 P.2d 476 (1961).
[12] RT p. 123, 134-136.
[13] State v. Smith, 136 Ariz. 273, 655 P.2d 995 (1983); see also State v. Bocharski, 200 Ariz. 50, 22 P.3d 43 (2001) (trial courts have broad discretion in admitting photographs).

> evidence offered may be admitted subject to a determination by the judge or hearing officer that the offered evidence is relevant and material and has some probative value to a fact at issue.[14]

The issue before the court at trial was the condition of Appellant's property as it appeared on May 12, 2001, and whether it was in violation of the Neighborhood Preservation Ordinance. The court found that the photographs and documents the Appellant wanted to introduce did not pertain to the date at issue, and were therefore, not relevant. Accordingly, the decision not to admit the photographs and documents was correct and within the court's broad discretion.

Second, we address the latter issue that Appellant raised in her brief that the court would not allow her to argue applicable case law during the trial. Appellant contends that the court admonished her for citing to legal authority and for not submitting all cases to be cited prior to the beginning of trial.[15] While the Appellant's statement is true, she neglects to mention the reason the court admonished her. As demonstrated by the record, the lower court specifically told Appellant and prosecutor before the hearing that if either "…have any points of authorities, motions or anything else …[to] submit them in a timely fashion so that I can review them and address them."[16] On the day of the hearing, Appellant attempted to cite to cases, which were not presented to the State or the court as requested and required. The trial judge explained to the Appellant that citing case law and points of memorandum without submitting it before the trial does not allow the court to review, shephardize or research the cases.[17] The decision to not allow the Appellant to cite and argue case law that was not submitted properly was not an abuse of the lower court's discretion, particularly when

[14] Phoenix City Court Loc. Rules Rule 2.15.
[15] Appellant's Memoranda p. 2
[16] RT p .47 ll. 3-8.
[17] RT p. 59 ll, 13-25, p. 60 ll. 1-2.

the Appellant directly violated the Court's order to present the information before the hearing.[18]

Third, Appellant contends that she could not object to the evidence presented at trial, because she did not know the evidence prior to trial. Although Appellant may not have known the evidence prior to trial, this does not excuse the fact that Appellant could have known and that it is Appellant's responsibility to do so. Rule 1.3 under the Local Rules of Procedure provides in pertinent part that "…The defendant may inspect and review physical evidence in the possession of the prosecutor."[19] Therefore, since the Appellant failed to inspect the evidence prior to trial, I find no error.

6. Overly Vague Charges

The Appellant also contends that court erred in denying her motion to dismiss the charges because the charging document was overly vague. The Appellant contends that the charges "…should be specific enough to allow the average person to understand exactly what the charges are."[20] Additionally, the Appellant contends that it is not the ordinances that she does not understand, but the citation document that Appellant received from the inspector.

As regards to the interpretation of the ordinance, statutory interpretation must first and foremost give effect to legislative intent.[21] If more than one possible interpretation is possible, the most reasonable interpretation must be adopted.[22] Here, the ordinances are quite easily interpreted, despite Appellant's claims.

[18] RT, p. 59, ll. 14-25, p.60 ll. 1-11.
[19] Local Rules of Practice and Procedure, City Court, City of Phoenix (AZ) Rule 1.5 (West 2002).
[20] Appellants Memo p. 2.
[21] Abbot v. City of Tempe, 129 Ariz. 273, 275, 630 P.2d 569 (App. 1981).
[22] Id.

First, I address Appellant's contention that the charging document from the inspector was overly vague. The local rules for the City of Phoenix detail the requirements for a civil citation and clearly defines a sufficient citation. The citation shall at least contain:

> The time, date, and place of the alleged violation; reference to the city ordinance or code provision violated; the time, date, and place for the defendant to appear; an affirmation signed by the citing city employee that the violation took place; and warning of default in the event of failure to appear.[23]

Moreover, under the local rules for a city court:

> No citation or complaint shall be deemed insufficient for failure to contain a definite statement of the essential facts constituting the specific violation which the defendant is alleged to have committed if the citation or complaint contains either a written description of the violation or a designation of the city code section alleged to have been violated.[24]

Here, the citations issued to the Appellant indicated not only the specific codes violated, but the Appellant was also given a verbal description of the applicable code sections. The Appellant argues that fundamental fairness requires that "criminal offenses be defined in terms sufficient to give a person of ordinary intelligence fair notice that his contemplated conducted is forbidden by statute".[25] Moreover, the Appellant continues that the reason for the underlying principle is that no person should be at risk of his personal liberty as

[23] Phoenix City Court Loc. R. Rule 2.3(B)
[24] Phoenix City Court Loc. R. Rules 2.5
[25] Appellant memo, p.3, quoting State v. Varela, 120 Ariz. 596, 587 P.2d 1173 (1978).

to speculate to the meaning of a criminal statute.[26] Although the quotation cited by Appellant is accurate for criminal matters, the case at issue here is a civil matter, and therefore the citation to this rule does not apply in this case. Moreover, in this civil matter, the Appellant's liberty is not at risk, because as this court has noted this is not a criminal matter, nor are the ordinances violated criminal statutes.

THIS COURT FINDS the ordinance not to be overly vague, but rather clear, precise, and easily understandable.

7. Fourth Amendment Violation

Appellant contends that the photographs taken by the inspector and admitted into evidence by the court violate the Fourth Amendment. The Fourth Amendment provides that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches an seizures, shall not be violated."[27] The core of the Fourth Amendment stands on the right of persons to be free from governmental intrusion.[28] However, the first question here is whether a Fourth Amendment "search" has occurred. The touchstone of the Fourth Amendment analysis of lawful search is whether a person has a constitutionally protected expectation of privacy. A search does not occur unless the individual manifested a subjective expectation of privacy in the searched object and society is willing to recognize that expectation as reasonable.[29]

Appellant suggests that because she has a wood fence around her backyard she has demonstrated an absolute expectation of privacy in what goes on in her backyard. The United States Supreme Court has expressly stated that an individual does not have the protection of the Fourth Amendment if the activities

[26] Appellant memo, p.3 quoting Connally v. General Construction Company, 269 U.S. 385, 391, 44 S.Ct. 126, 127 (1925).
[27] U.S. Const. Amend. IV.
[28] Kyllo v. U.S., 533 U.S. 27, 121 S. Ct. 2038 (2001) quoting Silverman v. U.S., 365 U.S. 505, 511 (1961).
[29] See California v. Ciraolo, 476 U.S. 207, 211, 106 S.Ct. 1809.

are visible to the public, even if the individual has taken measures to try and shield the activities from view.[30]

In Ciraolo, police officers in a private plane flew over the defendant's property, which had a ten foot wall around it and observed marijuana plants growing. The Court held that the defendant did not have an expectation of privacy in his backyard because any member of the public who was in an airplane could have seen what the police officers saw.[31] Quoting Katz v. United States[32] the Court stated that "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."[33] The Court went on to explain that a 10-foot fence would not shield growing marijuana plants from a citizen or police officer who was standing on a truck or riding in a two-level bus and therefore there is no expectation of privacy in illegal activity occurring in a backyard. Also quoting Katz, the Court explained that an individual who engages in illegal activity because a power company repair mechanic on a pole overlooking the backyard could see the illegal activity.[34]

Here, the inspector took photographs over Appellant's wood and chainlink fence surrounding the backyard.[35] In addition, the investigator testified that the fence was unsound and the photographs admitted into evidence depict a fence that is leaning and missing slats.[36] Not only would the inspector be able to see the condition of the backyard by looking through the holes created by the missing slats in the fence, but, as the Court stated in Ciraolo, the inspector could still lawfully see the violations and photograph them if she stood on a truck.

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[30] Id.
[31] Ciraolo, 476 U.S. at 213-14.
[32] 389 U.S. 347, 88 S. Ct. 507 (1967).
[33] Id.
[34] Ciraolo, 476 U.S. at 214-15.
[35] RT p. 60-63.
[36] RT p. 65, l. 13.

The analysis and holding in Ciraolo was upheld by the United States Supreme Court in Florida v. Riley.[37] In Riley, the defendant was also growing marijuana in his backyard, but, unlike the defendant in Ciraolo, went to extraordinary lengths to try and demonstrate that he believed he had an expectation of privacy in his backyard. The marijuana was growing in a greenhouse that was completely enclosed on two sides and the other two sides were obscured from view by surrounding vegetation and a mobile home.[38] A wire fence surrounded the property.[39] In spite of the defendant's efforts to protect his illegal activities from view, the Court held that the defendant did not have an expectation of privacy in his backyard.[40] Since any individual in a helicopter could see into the defendant's backyard, so can the police officers.[41] "As a general proposition, the police may see what may be seen 'from a public vantage point' where [they have] a right to be."[39]

Applying Riley to the present case, Appellant does not have an expectation of privacy in the illegal activity in her backyard. The condition of her backyard was not concealed at all. Moreover, the neighbors saw the conditions and complained to city authorities about the conditions.[40] The inspector took the photographs from the alley, an area where she legally had the right to be.[41] Since any citizen could see and photograph the Appellant's property violations by looking through the fence or by standing on a truck in the alley, so may the inspector. Therefore, no "search" occurred because visual observation is no search at all.

THIS COURT FINDS no violation of the Fourth Amendment to the United States Constitution.

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[37] 488 U.S. 445, 109 S.Ct. 693 (1989).
[38] Riley, 488 U.S. at 448.
[39] Id.
[40] Riley, 488 U.S. at 450.
[41] Id.
[39] Riley, 488 U.S. at 449.
[40] RT p. 67.
[41] RT p. 66, line 1.

8. Violation of Phoenix City Code § 39-2

Appellant argues that the State should not have cited her for violations of the Neighborhood Preservation Ordinance because the purpose of this ordinance is not to cause undue hardship. The purpose of the Ordinance is to promote the health, safety, and welfare of the citizens of Phoenix and to protect neighborhoods against hazardous and blighted conditions that contribute to the downgrading of neighborhood property values.[42]

Preventing "undue hardship" does not mean that Appellant can violate the Ordinance and keep her property in any condition she likes nor does it mean that Appellant cannot be cited and prosecuted for those violations.

The trial court suspended $1,600 of the fines. In addition, the City of Phoenix has a program by which homeowners who meet the income criteria can receive financial assistance from the city to fix certain problems on residential properties. To determine eligibility the homeowner must submit a hardship assistance application and comply with any reasonable requests, including those regarding income. A homeowner does not have a right to financial assistance from the city. At the time the citations were issued, Appellant had not submitted her hardship application.[43] After she was actually cited for the violations (notice of a violation had previously occurred), Appellant then filed her application and has delayed giving the required and necessary income information to the City of Phoenix.[44] Even as of the sentencing date, February 13, 2002, Appellant still had not provided the required income information.[45] In fact, the lower court at sentencing expressed its disappointment with Appellant because it did not appear to the court that she had made diligent efforts to take care of the problems on her

[42] P.C.C. § 39-2
[43] RT p. 67, lines 4-18.
[44] RT p. 227-232.
[45] RT p. 243-250.

property or make sure the hardship application was completed in full.[46]

Appellant caused herself any alleged undue hardship. In this case, Appellant is the architect of her fines. She chose to keep her property in an illegal condition, she chose not to bring the property into compliance after warnings by the city, and she chose not to cooperate with the hardship application process. The City of Phoenix has not caused the Appellant any undue hardship by her ordinance violations.

Based upon these facts, there was sufficient evidence for the trial court to find the Appellant responsible of all charges. The trial court did not abuse its discretion.

IT IS THEREFORE ORDERED affirming the judgment of the Phoenix City Court in this case.

IT IS FURTHER ORDERED remanding this matter back to the Phoenix City Court for all further and future proceedings.

[46] RT p. 247, lines 17-25; p. 248 ll. 1-3.